No. 75-1456

In the Supreme Court of the United States

OCTOBER TERM, 1975

MELVIN LEMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-22a) is reported at 527 F.2d 662. The opinion of the district court on petitioner's pre-trial motions (Pet. App. 9a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1975, and a petition for rehearing

with suggestion of rehearing *en banc* was denied on February 13, 1976 (Pet. App. 23a). On March 10, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 13, 1976. The petition was filed on April 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest.

2. Whether the admission of fingerprint evidence violated petitioner's Sixth Amendment right of confrontation.

3. Whether the district court properly refused to compel the disclosure of the identity of a government informant.

4. Whether the judgment of the district court (which acted as the trier of fact) was based upon evidence not presented at trial.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1).[1] He was sentenced to ten years' imprisonment, under the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and a three-year

[1] Co-defendant Alice Jones, who was charged with the same offense, was acquitted.

term of special parole. The court of appeals affirmed (Pet. App. 15a-22a; 527 F. 2d 662).

On January 22, 1973, police officers searched a retail clothing store in Detroit, Michigan, pursuant to a warrant that authorized the search of the store for "heroin and other evidence of dealing in narcotic drugs" (Pet. App. 3a). In the course of the search, the police discovered 16 tin foil packets of heroin in a file cabinet located in an office area that was not accessible to the general public (S. Tr. 50-51, 74-75, 100-101, 115-116, 135, 140-141, 155-157, 223; Tr. 17-22, 31-36, 76, 82, 190-194).[2] Handguns and narcotics paraphernalia were also seized from the store (S. Tr. 50, 59; Tr. 129).

While the search was underway but before the heroin had been found, petitioner arrived at the store and identified himself as one of the owners of the business (S. Tr. 121-122, 164; Tr. 194-195, 217-218). The police officers ordered him and other persons to remain in the front area of the store in order not to interfere with the search. After the heroin was discovered and field-tested, petitioner and co-defendant Jones, who managed the store, were arrested and fingerprinted (S. Tr. 63-64, 133-135, 161-162, 169-171; Tr. 80-81, 113-115, 118, 193-195, 217-218, 221-224). Subsequent testing by the Michigan State Police Laboratory revealed that petitioner's fingerprints matched those found on two of the packets of heroin seized from the store (Tr. 150-151, 255-258, 261-263).

[2] "S. Tr." refers to the transcript of the pre-trial suppression hearing.

ARGUMENT

1. Petitioner's contention (Pet. 7-11) that the police lacked probable cause to arrest him is based upon the erroneous assertion that he was arrested (a) before the discovery of the heroin and (b) solely because of his admission that he was an owner of the business. However, both lower courts found (Pet. App. 12a, 16a), and the record indicates, that petitioner was not arrested until after the heroin had been located.[3] The court of appeals therefore correctly concluded that there was probable cause for petitioner's arrest (Pet. App. 18a-19a):

> * * * [T]he officer had sufficient information to afford him probable cause to believe that [petitioner] possessed the narcotics found in the file cabinet. [Petitioner's] status as a part owner of the business combined with the fact that the narcotics were found in a filing cabinet in the office area of the store not accessible to the general public were sufficient to cause a reasonable person to have believed that [petitioner] and Miss Jones, the store manager on duty at the time of the search, were in control of the office area and possessed the drugs found there.

[3] Indeed, petitioner's present assertions are contrary to his representations in the district court that his arrest followed the discovery of the heroin (C.A. App. 105, 111-112). "C.A. App." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court. In any event, the precise sequence of events is not significant, since the only evidence derived from petitioner's arrest that was used against him at trial—his fingerprints—was taken after the discovery of the heroin.

See also *Johnson* v. *Wright*, 509 F. 2d 828, 830 (C.A. 5), certiorari denied December 9, 1975, No. 75-31; *United States* v. *Hutchinson*, 488 F. 2d 484, 488-489 (C.A. 8), certiorari denied *sub nom. Ennis* v. *United States*, 417 U.S. 915; *United States* v. *Carter*, 486 F. 2d 1027, 1028 (C.A. 6), certiorari denied, 416 U.S. 937.

2. The packets of ~~heroin~~ seized from the file cabinet and the fingerprints taken from petitioner on the day of his arrest were sent for analysis to Sergeant Franklin Nichols, a latent print specialist at the Michigan State Police Laboratory (Tr. 186, 196-205, 232-235). Sgt. Nichols obtained fingerprint lifts from two of the tin foil packets and, after comparing the lifts to petitioner's fingerprints, concluded that the fingerprints on the packets of heroin were those of petitioner. Following standard procedure, Sergeant Merlin Mowery, a latent fingerprint examiner, verified Sgt. Nichols' findings at the laboratory (Tr. 150-173, 236-248, 255-264, 268, 277-278).

Because of Sgt. Nichols' death prior to trial, Sgt. Mowery was called to testify about the fingerprint analysis. Sgt. Mowery, who had worked closely with Sgt. Nichols and was familiar with his handwriting, identified the pieces of tin foil and petitioner's fingerprint card, stated that a tag attached to each lift indicated that it had been taken from the foil, and testified that his own examination of the lifts and the fingerprint cards had confirmed the findings of Sgt. Nichols that both sets of fingerprints belonged to petitioner (Pet. App. 19a-20a).

Petitioner contends (Pet. 20-23) that the trial court violated his Sixth Amendment right of confrontation by admitting these exhibits into evidence and by permitting Sgt. Mowery to testify concerning Sgt. Nichols' fingerprint analysis. But, as the court of appeals correctly noted (Pet. App. 20a), the exhibits (each of which had been logged into the Michigan State Police Laboratory and marked in accordance with the laboratory's standard procedures) were admissible under the business records exception to the hearsay rule, 28 U.S.C. 1732. See, *e.g.*, *United States* v. *Calvert*, 523 F. 2d 895, 911 (C.A. 8); *United States* v. *Fendley*, 522 F. 2d 181, 185 (C.A. 5). Although petitioner asserts (Pet. 22) that there was no "record custodian testimony" introduced at trial, that requirement of the business records exception was satisfied by the testimony of Sgt. Mowery (a person familiar with the laboratory practices involved) that the records were kept in the ordinary course of business and that they were authentic. See, *e.g.*, *United States* v. *Fendley*, *supra*, 522 F. 2d at 185; *United States* v. *Leal*, 509 F. 2d 122, 127 (C.A. 9); *United States* v. *Russo*, 480 F. 2d 1228, 1240 (C.A. 6), certiorari denied, 414 U.S. 1157. See also Fed. R. Evid. 803(6).

This Court has emphasized "that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400

U.S. 74, 88, quoting from *California* v. *Green*, 399 U.S. 149, 161. The fingerprint identification evidence in this case was fully explained by Sgt. Mowrey, who confirmed the conclusion reached by Sgt. Nichols and who was subject to cross-examination by petitioner. The court of appeals therefore correctly concluded (Pet. App. 20a) that "because the trier of fact had a satisfactory basis in Mowery's testimony for evaluating the fingerprint evidence, there was no violation of [petitioner's] rights guaranteed by the Sixth Amendment."

3. Petitioner's contention (Pet. 12-17) that the district court erred in not requiring the government to disclose the identity of its informant is insubstantial. The test for determining whether an informant's identity should be revealed was outlined in *Roviaro* v. *United States*, 353 U.S. 53, 62:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Thus, *Roviaro* makes clear that the Court "was unwilling to impose any absolute rule requiring disclosure of an informant's identity * * *." *McCray* v. *Illinois*, 386 U.S. 300, 311. The striking of a proper balance between a defendant's demand for disclosure

and the government's legitimate need for confidentiality is addressed to the sound discretion of the district court. See, *e.g.*, *United States* v. *Anderson*, 509 F. 2d 724, 729 (C.A. 9), certiorari denied, 420 U.S. 910; *United States* v. *Bell*, 506 F. 2d 207, 215-216 (C.A. D.C.).

The trial judge (who was also the trier of fact) did not abuse his discretion in this case. The informant's only relevance here was in providing information that was used to obtain the search warrant; he did not participate in or witness the offense of which petitioner was convicted, nor did petitioner present any credible evidence to the contrary. See *United States* v. *Clark*, 482 F. 2d 103, 104 (C.A. 5). Although petitioner contended at trial that he was "framed"—that "there was no informant as alleged" but only a store employee who, for whatever reason, entrapped him (Pet. 12)—the district court properly rejected this wholly speculative claim and credited instead the "evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant." *McCray* v. *Illinois*, *supra*, 386 U.S. at 305. See S. Tr. 5-49.

4. Finally, petitioner contends (Pet. 17-20) that the district court relied at trial upon evidence that had been introduced only at the suppression hearing. Although petitioner does not specify the basis for his objection, he apparently refers to the "crucial non-existent fact" (Pet. 18) that his fingerprints had been found on the foil packets of heroin. As we noted above, see p. 5, *supra*, however, this evidence clearly

was presented at trial by Sgt. Mowery's testimony. Furthermore, the district court's comment in the course of denying petitioner's post-trial motion for a judgment of acquittal or new trial—"this case has taken a considerable amount of time. I had an evidentiary hearing on this that lasted perhaps a week * * *" (C.A. App. 234)—hardly substantiates petitioner's allegations, since petitioner's post-trial motion had expressly incorporated the issues raised in his pre-trial motion to suppress (see *id.* at 213). The court's remark was directed to those issues, not to the sufficiency of the evidence. Indeed, the court immediately proceeded to discuss the trial, noting that it had "heard this case without a jury" and had acquitted petitioner's co-defendant while finding "that the government did prove its case beyond a reasonable doubt as it relates to [petitioner]" (*id.* at 234).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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